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THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.



VOLUME EIGHT

1953

THE RECORD of The Association of the Bar is published at 42 West 44 Street, New York, 36. Editorial inquiries should be addressed to the Executive Secretary. Information on exchange arrangements may be secured from the Librarian of the Association.

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THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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THE RECORD is published at the House of the Association, 42 West 44th Street, New York 36.

Volume 8

January 1953

Number 1

Association Activities

AT THE DECEMBER Stated Meeting the following resolution, presented by Whitney North Seymour, was unanimously adopted:

WHEREAS information disclosed in recent public hearings of the State Crime Commission, acting under very limited powers, has revealed conditions in some of the courts in the First Judicial District indicating the need for an investigation more complete than the present Commission has had the power to make; and

WHEREAS since its foundation, this Association has had a profound interest in the efficiency and integrity of the courts, particularly in the First Judicial District, and believes that while the majority of those on the bench and connected with the courts in this District are undoubtedly beyond reproach, a general investigation would be in the public interest;

NOW, THEREFORE, BE IT

RESOLVED that The Association of the Bar of the City of New York requests the Governor to appoint a commission with necessary power to make a complete investigation of the courts in the First Judicial District, including an in-

vestigation of political and other undesirable influences, if any, affecting the selection of judges, court personnel, referees, receivers, and juries, and the dispatch of judicial business and of all other problems which may be germane to the efficiency and integrity of our judicial system.

The meeting also approved the report of the Committee on Law Reform, George G. Gallantz, Chairman, on Consideration of New Methods to Select Judges. The following resolution was adopted:

WHEREAS it is the sense of The Association of the Bar of the City of New York, without expressing or implying any criticism of any sitting judge or justice, that a change should be made in the existing method for selecting justices of the Supreme Court in the First Judicial District; now, therefore, be it

RESOLVED that this Association favors adoption of an amendment to the Constitution of the State of New York providing that

1. Vacancies on the Supreme Court of the State of New York in the First Judicial District shall be filled by appointment of the Governor from a panel of three persons submitted to him by a judicial commission, the appointee to serve until the 31st day of December following the general election next occurring not less than twelve months after his appointment;

2. If the appointee shall file with the Secretary of State a declaration of candidacy for election to succeed himself, there shall be submitted at said general election to the qualified voters of the First Judicial District, in the manner in which propositions are submitted to popular vote, the question "Shall Justice —— of the Supreme Court of the State of New York be retained in office?"

3. The judicial commission shall consist of the Presiding Justice of the Appellate Division for the First Judi-

cial Department as its chairman, two residents of the First Judicial District qualified to vote therein, who shall not be lawyers and shall not both be adherents of the same political party, appointed by the Governor, and two members of the Bar having their offices in said District appointed by the Court of Appeals.

4. Members of the judicial commission other than such Presiding Justice shall hold office for four years, except that the terms of the two lawyers first appointed shall be one and three years, respectively, and the term of the first non-lawyer appointed shall be two years.

5. Members of the judicial commission other than such Presiding Justice shall be ineligible to succeed themselves and may not during their terms of office hold any office in a political party or any other public office.

6. Justices of the Supreme Court holding office at the time the said amendment takes effect shall continue to hold office until the expiration of their respective terms and may seek to succeed themselves in office by election as above provided without appointment by the Governor.

James B. Donovan, Chairman of the Committee on Insurance Law, presented his Committee's Report on Problems Created By Financially Irresponsible Motorists. The report was approved, and the following resolution was adopted:

WHEREAS it is the sense of The Association of the Bar of the City of New York that additional legislation is required in order to deal effectively with the social and economic problems created by financially irresponsible motorists in this state; now, therefore, be it

RESOLVED that this Association recommends adoption of an amendment to the Vehicle and Traffic Law, providing as set forth in this report, that every automobile owned by a resident or non-resident of this State, which is involved in an accident occurring within this jurisdiction

and resulting in substantial bodily injury or property damage, shall be impounded if the owner does not possess standard limits liability insurance or deposit equivalent security; and be it

FURTHER RESOLVED that if the legislature finds that legislation in addition to such an impoundment statute is required to order to deal effectively with such problems, this Association:

1. Recommends the enactment of a statute, as set forth in this report, creating a fund out of which would be paid, up to standard insurance limits of liability, unsatisfied judgments attributable to automobile accidents, such fund to be supervised by the Superintendent of Insurance as set forth in this report and to be created by levies upon uninsured registrants of motor vehicles and all insurance carriers transacting the business of automobile liability insurance in this state;
2. Opposes the enactment of a system of compulsory automobile insurance; and
3. Opposes the enactment of a system of compensation applicable to all persons injured in automobile accidents, without regard to fault.

The Honorable O. C. Gundersen, Minister of Justice of Norway, was a guest of the Association and spoke briefly. T. M. Winchester, the Editor of The Law Society's Gazette, was also present.



GEORGETOWN UNIVERSITY Law School was the winner of the final round of the third annual National Inter-Law School Moot Court Competition, sponsored by the Committee on Junior Bar Activities, John R. Miller, Chairman, held on December 4 and 5. The winner received the Samuel Seabury Award, a silver bowl, and one member of the team, Richard A. Gordon, received the prize for the best oral argument. The prize for the best brief was

received by the runner-up team, the University of Chicago Law School, and one of its members, Mrs. Jean Allard, was judged runner-up in the competition for the best oral argument. The Honorable Stanley F. Reed, Justice of the Supreme Court of the United States, presided over a bench which included The Honorable John J. Parker, Chief Judge of the Court of Appeals for the Fourth Circuit; The Honorable Leslie Knox Munro, Ambassador Extraordinary and Minister Plenipotentiary for New Zealand; The Honorable Stanley H. Fuld, Judge of the Court of Appeals of the State of New York; The Honorable David W. Peck, Presiding Justice of the Appellate Division of the Supreme Court of the State of New York; and Bethuel M. Webster, President of the Association.



ORRIN G. JUDD, who again this year has consented to serve as the Association's legislative representative in Albany, met with the Chairmen of all Committees having legislative programs. Mr. Judd also spoke briefly at the organization meeting of the Committee on State Legislation, A. Fairfield Dana, Chairman.



THE ANNUAL TWELFTH NIGHT PARTY, sponsored by the Committee on Entertainment, Boris Kostelanetz, Chairman, will be held on January 6, and will be in honor of Judge James Garrett Wallace. The Committee on Entertainment promises "a never-to-be-forgotten event with scintillating professional entertainment; surprises from members of the Bench and Bar; and a heart-warming tribute to the man who has done much to reclaim the Bar Association from the cobwebs." The next event on the Entertainment Committee's schedule is a Valentine Dance, which will be held on February 13. The Committee has also announced a casting call for the Association Night Show, which is to be held the week of April 13. Those members interested in participating in the show will meet at the House of the Association on January 24 at 2:00 P.M.

THE FOLLOWING topics are under study by the Committee on Law Reform, George G. Gallantz, Chairman: Section 61-b of the General Corporation Law, parole of persons convicted of book-making, federal statutes governing wire-tapping, administration of estates of disappeared persons, the office of public defender, validity of foreign divorces, procedures for deposition and discovery, and the need for general revision of the New York corporation laws.



UPON THE recommendation of the Special Committee on Public and Bar Relations, Maurice T. Moore, Chairman, the Executive Committee has engaged Paul D. Green as public relations consultant to the Association.



IN DECEMBER the President, members of the Executive Committee, and members of the Committees on Foreign Law and International Law, and Chairmen of all Association Committees entertained lawyers associated with the various delegations to the United Nations General Assembly. In extending the Association's welcome to the guests, the President made the following remarks:

"It is my privilege as President to greet you on behalf of the Officers and Executive Committee and the Committees on Foreign and International Law of The Association of the Bar of the City of New York. I am pleased to welcome you to this House, where we have entertained many distinguished jurists and lawyers from foreign countries, some of whom we number proudly among our honorary members. We want you to feel at home here; we hope you will return to this place for refreshment and companionship.

"It is one of the joys of our calling that notwithstanding disputes and disagreements we shake hands and call each other friend and even brother. I suppose this is because, like mathematicians and musicians, we employ a universal language the message of which, for us, is law and justice.

"We are, I say, joined by methods, manners, and objectives; but there is some confusion of tongues even among English-speaking lawyers. Too often we use the wrong word and give the wrong impression—this because (and I am referring particularly to Americans) we are lazy about languages, or because, as Sir Oliver Franks intimated in his beautiful farewell speech,

we forget that the British *are* British, that the French *are* French, &c. We lawyers have much in common; we may be expected to make a special effort to see each other with a clear and compassionate eye.

"I set out to welcome you to this House, a building which resembles in many ways the places in which you gather at home, and in which we have been received so warmly as your guests. We offer you our rooms, our reports and publications, and our meetings, the facilities through which the energy and spirit of the Association become palpable. We offer you, especially, the Library, which is of course the heart of this institution. In this we are returning in kind a little of what we have received—the record of the quest for justice in your many countries, large and small. Indeed, without that record our treasures would be few.

"One day last summer I came here to meet the Mayor of Dakar. A delegate to the United Nations, educated in Paris, he had been a legislator and a judge; he came, as I think you come, to mark the comradeship of our profession. I mention our colleague because, with the assistance of the Reference Librarian,—to whom, fortunately, difference of language is no barrier,—I was able to find on our shelves statutes and decisions in the writing of which my guest had participated. We drank each other's health and parted friends.

"It was this happy experience which led me to say to the Librarian that, instead of taking you to the stacks, we might bring to you examples of the collections we have here. The Librarian suggests that, in addition to books from United Nations countries, you might like to see examples of American colonial law, a few of which are on display.

"Finally, gentlemen, we are happy to have you with us; and we drink your health."



THE COMMITTEE on the Domestic Relations Court, Sylvia Jaffin Singer, Chairman, will hold during the month an informal reception for Justices of the Domestic Relations Court. The Committee also plans to hold a forum, "Judges for Children," in April. Among the speakers will be Mrs. Eleanor Roosevelt, William Dean Embree, Professor Walter Gellhorn, Dr. Alfred Kahn, and Presiding Justice John Warren Hill.



THE COMMITTEE on Medical Jurisprudence, Julius Isaacs, Chairman, is making a thoroughgoing study of release procedures of federal and state mental institutions. The Committee also has

under study the proposed code of uniform practices governing the use of hospital records.



THE MEMBERS of the Committee on Taxation, John H. Alexander, Chairman, participated in a conference with representatives from the technical staff of the Treasury Department concerning proposed regulations under the Revenue Act relating to redemption of stock to pay death taxes.



EDWARD S. CORWIN, professor emeritus of Princeton University, will give a course on the American Constitution at the New School for Social Research beginning on February 19. The course will meet weekly on Thursdays from 6:20 to 8:00 P.M. Registration is now open.



THE SPECIAL COMMITTEE on a New Courthouse for the Municipal and City Courts, Francis H. Horan, Chairman, has reported that the Board of Estimate acted favorably on the Committee's request that Item PW-84 be included in the Capital Budget. PW-84 provides for \$1,500,000, which would be used for site acquisition and plans for the new courthouse. There still remains the problem of securing the necessary appropriation of the funds.

The Calendar of the Association for January and February

(As of December 23, 1952)

- January 1 "Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
- January 5 Dinner Meeting of Committee on Entertainment
Dinner Meeting of Committee on the Municipal Court
Meeting of Municipal Court Committee Auxiliary Members
Dinner Meeting of Committee on Professional Ethics
- January 6 *Twelfth Night Festival*. Sponsorship Committee on Entertainment
- January 7 Dinner Meeting of Executive Committee
Meeting of Section on Labor Law
Meeting of Section on Wills, Trusts and Estates
- January 8 Dinner Meeting of Committee on Labor and Social Security Legislation
Meeting of Section on Taxation
"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
- January 12 Dinner Meeting of Committee on Federal Legislation
- January 13 "*Problems of United States Leadership—A Practitioner's View*." Speaker: Hon. Ernest A. Gross, Ambassador and Deputy United States Representative to the United Nations, 8:00 P.M. *Buffet Supper*, 6:15 P.M.
Meeting of Committee on International Law
- January 14 Meeting of Section on Corporations
- January 15 "Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.

- January 19 Meeting of Section on Administrative Law and Procedure
Meeting of Committee on the City Court
Meeting of Library Committee
Dinner Meeting of Committee on Medical Jurisprudence
- January 20 *Stated Meeting of the Association, 8:00 P.M. Buffet Supper 6:15 P.M.*
- January 21 Meeting of Committee on Admissions
Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Dinner Meeting of Committee on Foreign Law
Round Table Conference, 8:15 P.M. Hon. William T. Collins, Surrogate, New York County, Guest
- January 22 Dinner Meeting of Committee on Insurance Law
Meeting of Section on Jurisprudence and Comparative Law
Dinner Meeting of Committee on Legal Aid
Dinner Meeting of Committee on Taxation
"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
- January 24 Meeting of members interested in participating in Annual Association Night Show—2 P.M.
- January 26 Dinner Meeting of Committee on Courts of Superior Jurisdiction
- January 27 Dinner Meeting of Committee on Municipal Affairs
Meeting of Committee on State Legislation
- January 29 "Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.
- January 30 Annual Meeting of New York State Bar Association
- January 31 Annual Meeting of New York State Bar Association
- February 2 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics

- February 3 Dinner Meeting of Committee on Bankruptcy and
Corporate Reorganizations
Meeting of Committee on State Legislation
Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation
and Trade Marks
- February 4 Dinner Meeting of Executive Committee
Meeting of Section on Labor Law
Meeting of Section on Wills, Trusts and Estates
- February 5 Meeting of Section on Taxation
"Perspective"—Television Program, WJZ-TV (Chan-
nel 7), 9:00 P.M.
- February 10 *Lecture by Hon. Warren Lee Pierson, Chairman of the
Board TWA and United States Representative with
the rank of Ambassador to the Tripartite Commis-
sion on German Debts, 8:00 P.M. Buffet Supper,
6:15 P.M.*
Meeting of Committee on State Legislation
- February 12 "Perspective"—Television Program, WJZ-TV (Chan-
nel 7), 9:00 P.M.
- February 13 Dance—Sponsorship Committee on Entertainment
- February 16 Meeting of Library Committee
- February 17 Dinner Meeting of Committee on Domestic Relations
Court
Meeting of Committee on State Legislation
- February 18 Meeting of Committee on Admissions
Meeting of Section on Corporations
Meeting of Committee on Foreign Law
Meeting of New York State Bar Association Section on
Antitrust Law
- February 19 Dinner Meeting of Committee on Insurance Law
Meeting of New York State Bar Association Section on
Antitrust Law
"Perspective"—Television Program, WJZ-TV (Chan-
nel 7), 9:00 P.M.

- February 20 Meeting of New York State Bar Association Section on Food, Drug and Cosmetic Law
- February 24 Dinner Meeting of Committee on Courts of Superior Jurisdiction
Meeting of Section on Litigation
Dinner Meeting of Committee on Medical Jurisprudence
Meeting of Committee on State Legislation
- February 25 Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Round Table Conference, 8:15 P.M. Guest, Hon. Charles D. Breitl, Justice of the Supreme Court of the State of New York
- February 26 Meeting of Section on Jurisprudence and Comparative Law
"Perspective"—Television Program, WJZ-TV (Channel 7), 9:00 P.M.

The Treasurer's Letter

To the Members of the Association:

In an earlier Treasurer's letter, Chauncey B. Garver reported that the executors of the Estate of the late William Nelson Cromwell had paid over to the Association the sum of \$300,000. on account of the legacy provided for in Mr. Cromwell's Will, being 3/100ths parts of his residuary estate. The Association received an additional distribution of \$75,000. in December 1951 and a further partial distribution of \$22,500. was received in January 1952. The executors of the Estate also paid over \$1,778.79 of income earned on the legacy during the withheld period. The principal received has been added to the "William Nelson Cromwell Library Fund," the income of which is a substantial aid in meeting the cost of maintaining the library.

When the Association of the Bar of the City of New York Fund, Inc. was incorporated in July 1946 its purposes were to receive gifts, grants and bequests, and to apply the principal and the income of its funds to the use of the Association for those activities only which were clearly educational, literary, scientific or charitable.

From the time of its organization and particularly in the past year the activities of the Fund have greatly widened and increased, and it is my sincere hope that this growth will continue. Since November 1951 the Fund has received from Mr. Laurance S. Rockefeller a most generous gift for a study of courts and other agencies concerned with the administration of laws relating to the family, to the end that the administration of justice by those courts and agencies be facilitated and improved. The New York Foundation has made a grant for the purpose of making descriptive studies and surveys of the administration of justice in the State of New York. A few months ago the Fund gratefully accepted from the Alfred P. Sloan Foundation, Inc. and the Ford Motor Company Fund grants for the purpose of financing an

experimental project to facilitate and improve the administration of justice by encouraging resort to expert medical testimony in personal injury cases in the courts of New York and Bronx Counties. The extension of the activities of the Fund must of course be limited to the purposes set forth in its charter.

In the same period, the Fund has benefited too from the generosity of the Association's members. In his annual report, the President mentioned the establishment of the Chauncey B. Garver Fund. I am very happy to report that many members have contributed their 3% Notes of the Association to this fund. The Association of the Bar of the City of New York Fund, Inc. now holds in its restricted and unrestricted funds \$17,900. in Notes of the Association, and it is hoped that more members and friends of the Association will become aware that gifts of Notes or cash, and legacies to the Fund are deductible for income and estate tax purposes.

GEORGE A. SPIEGELBERG

November 14th 1952.

Child Care Facilities Available to the Domestic Relations Court

On May 5, 1952 the Committee on the Domestic Relations Court of the Association sponsored a forum on "Child Care Facilities Available to the Domestic Relations Court," Mr. Henry G. Hotchkiss, presiding. It was and is the conclusion of the Committee that the Children's Court of this city can function effectively only if it has adequate facilities available for the care and treatment of the children it has a duty to protect. That our present facilities for the foster care of children are grossly inadequate and that the court is, accordingly, prevented from fulfilling its proper function is demonstrated by the following addresses delivered at the forum by the Honorable Justine Wise Polier, Judge of the Domestic Relations Court, Raymond M. Hilliard, Executive Director of Welfare and Health Council of New York City, and John J. Murphy, Executive Director, Children's Center of the New York City Department of Welfare.

Justice does not end its task with an adjudication of delinquency or neglect. The adjudication is but a warning that we must act quickly lest a child lose his opportunity to enjoy the benefits of our society. The price we pay for inadequate child care facilities are defeated and unhappy children, adults who are a continuing problem to themselves and to the community, and a sense of injustice and shame for all of us. It is a price that we cannot afford to continue paying.

THE HONORABLE JUSTINE WISE POLIER

Justice, Domestic Relations Court

It is most appropriate that this meeting on the facilities available to the Domestic Relations Court should be held in The Association of the Bar. The Children's Courts of this country have too long been the neglected child of the Bar Associations of this nation—and to the

extent that they have failed or become delinquent, the Bar must accept at least partial responsibility. It has been more than half a century since leaders of the Bench and Bar together with leaders of social work and religious groups successfully achieved the removal of children from the orbit of our criminal Courts. The guiding principle as set forth was to move from the concept of the determination of guilt and the assessment of a fixed penalty to the determination of what a child had done, the study of each child and the securing of such help or treatment as each child needed to ensure rehabilitation. We are here to discuss both the facilities available and *not* available to the Court. And I shall be blunt about the unmet needs which not only impair the usefulness of the Children's Court in this city but daily take their toll in terms of the happiness, normal development and life of the children of this city.

Under our laws the Department of Welfare is basically responsible for the care of dependent and neglected children who must be placed outside their homes. By tradition this responsibility has been delegated to private voluntary agencies who are in turn subsidized by the City of New York. Despite the growing number of children for whom voluntary agencies cannot or will not provide prompt and adequate care, there has been great reluctance to develop adequate public facilities so that no child shall be left without such care. For the past five years there have been from 500 to 800 children on any day known to be in need of care in foster homes or group homes for whom no such facilities are available.

1. Tonight there are approximately 100 babies in the hospitals of New York City, not because they need hospital care but because there are no private or public agencies which will provide the foster home care these babies need. These babies are needlessly subjected to the dangers inherent in hospital or large institutional care for infants. The continuation of these infants in hospitals is not only a threat to their physical well-being. According to experts, such non-personal care over extended periods impairs their intellectual and emotional development permanently.

2. Tonight there are several hundred neglected and dependent children in our temporary shelters because there are no foster homes or institutions of their own faith that will accept them or have space for them and because no long-term facilities (except for infants) have

been developed for these children under public auspices. In one shelter alone, which has a capacity for about 300 children, 88 have been found to be so disturbed as to need psychiatric treatment. Many of these children have become increasingly disturbed as days turned into weeks and weeks into months and even years of temporary shelter. The Children's Center, our largest shelter, geared to provide a program for a maximum of 90 days, has children who have been left there for one and two years and occasionally even longer.

In addition, dependent and neglected children suffering all the fears and hurts experienced by children removed from their parents and homes must each day be separated from sisters and brothers. One shelter may have a vacancy for a six-year-old but not for an eight-year-old or a four-year-old. The Children's Court, charged with the responsibility of acting as a wise parent should act, is thus forced by the lack of proper temporary shelters to perform the judicial act of directing the separation of children although it knows that this adds to the hurts and fears of children and is contrary to all that good child care requires. Nor are these separations brief. Frequently, family groups are found scattered through two, three and sometimes four shelters in different boroughs for months and months. It must also be noted that this kind of shelter care is hardly conducive to frequent or regular visitation by parents burdened with many other problems. These are parents who should be encouraged to strengthen their relationships with their children rather than discouraged from ever seeing them.

There is also an unmet need for the special type of care for emotionally disturbed children who require temporary shelter but also treatment before any kind of long-term care can be wisely planned. Although this need has been recognized by private and public agencies alike, no such facility is available. Such children must either be returned to the community although it is harmful to them and may endanger other children, be placed in temporary shelters where custodial care does not help and oftentimes aggravates their problems or be placed in hospitals where they do not belong—as a makeshift.

After a finding of fact as to neglect by parents or delinquency on the part of a child has been made, the Court must on the basis of the hearing, the social investigation and diagnostic material determine whether a child can be returned home under the supervision of a pro-

bation officer or whether the child requires placement away from home in a foster home or group setting.

The Children's Court has the benefit of diagnostic facilities and a social investigation generally not available in other courts dealing with criminal offenders or family problems. It has the aid of recommendations by experts in the fields of medicine, social work and psychiatry in many instances. The question repeatedly facing the Children's Court is: How to follow through on a plan that will bring the child the help he needs in accordance with the knowledge available.

The Children's Court is fortunate in having a staff of devoted probation officers who have long sought in the face of all but insuperable odds to help children adjust in their own homes, to strengthen family ties, to guide parents in difficult situations and to enlist the help of schools and voluntary agencies. I know of no task that requires more sensitivity, devotion and skill than this, nor one that could be more rewarding to the welfare of the community. Everyone speaks of and at least gives lip service to the importance of family life and the welfare of our children. The hard facts, however, are that the probation salaries are so pitifully low, the caseloads so heavy and the supervisory positions so few that no professional graduate training can be required. As a result of the low pay, young people who have passed the Civil Service examinations and would like to work in this field have refused appointments. Moreover, competent young people find it impossible to remain at probation work and support their families even in modest circumstances in New York City.

In other fields, we have recognized that the greatest skill is needed in the preventive fields of health and medicine. In the field of preventing delinquency, crime, mental illness or the maladjustment of our children in the community—and that includes the Bar—the citizens and the City fathers have failed to make possible the securing and retaining of skilled personnel at the most critical point of needed services.

When the diagnostic study of a child and his family problems present the need for placement away from home, the Court is again confronted with incredible gaps in the facilities that are needed. In the care of dependent and neglected children except for a handful of foster homes conducted by the Department of Welfare, the courts

must ask voluntary agencies to accept each child. The Court can only request care, and if the child is rejected because there are no vacancies, because he is too old or too young for the group in which there is a vacancy or because he presents problems in learning or behavior that the agency will not tackle, the Court must shop around—often taking not the service indicated but whatever is available. Thus the Court, in a high proportion of cases, has the responsibility but not the power to secure the type of care that it has every reason to believe will most benefit the child. The "whatever available" may mean institutional care when a foster home is indicated, separation of brothers and sisters who should be kept together, custodial care without special services such as remedial reading, psychiatric or social work services which the child requires. In some instances, paradoxically, the diagnostic reports showing the need for intensive treatment cause all doors to be closed, and the child must therefore be returned to the community by the Court until he or she has deteriorated further or committed some act which calls for being "put away." In other instances, the lack of appropriate child care facilities has forced the Court to commit children to State hospitals for the mentally ill although it is clear that this means giving up the last clear chance of hope of rehabilitation for the child.

These same problems arise in regard to facilities for children who are adjudicated as delinquent. In this area, the State of New York has basic and primary responsibility for providing the necessary facilities for children. With the exception of its programs at Warwick and Hudson for delinquent boys and girls between twelve and sixteen, the State has delegated its responsibility almost entirely to voluntary agencies. It has not provided programs for seriously disturbed delinquent children in need of treatment, who do not belong in the State hospitals, but who are not acceptable within the ordinary voluntary child care programs. It has provided no program for children under twelve, although the inadequate private facilities for this group result in long waiting lists and the frequent return to the community of children in need of placement. It has not even developed adequate casework and treatment services within its own institutions, although these institutions receive the highest proportion of seriously delinquent girls and boys whom the private agencies do not accept. I regret to say that it has not even made full use of the Federal funds

available for training personnel, for research and for treatment within its own institutions.

To sum up these gaps in child care facilities:

—The City of New York has failed to provide shelter and long-term facilities for dependent and neglected children who need placement but for whom voluntary agencies have not provided adequate services.

—The City of New York has also failed to provide an incentive for better quality of service including adequate medical, social and psychiatric services because while substantially increasing its subsidies to private agencies, it has continued to pay the same per capita regardless of the quality of service.

—The City of New York has failed to establish personnel qualifications consistent with the services demanded of the probation officers of the Children's Court who constitute the social work arm of the Court. It has miserably failed to pay salaries that make possible the establishment of such standards or the professional development on the job of its present staff.

—The City of New York has failed to provide the variety of facilities needed to treat delinquent children of different age groups and presenting different problems for whom the voluntary agencies have not provided adequate services.

—The State of New York has failed to provide appropriate services with adequate treatment for the mentally ill and emotionally disturbed children who belong neither in normal child-caring institutions nor in State Hospitals for the mentally ill.

—The State of New York has failed to set the pace in providing adequate services for treatment and rehabilitation in even those few institutions which are administered by its own Departments of Social Welfare and Mental Hygiene. It has also failed to set minimal standards for either personnel or treatment services on the part of voluntary agencies to which public agencies commit the care of children in need of treatment.

—The State of New York has failed to develop in-training course policies for educational leave to raise personnel qualifications, needed treatment and research projects, and has even failed to avail itself fully of Federal funds that could be used for these purposes.

—The State of New York has not developed ways in which it might through financial assistance to local units of government improve the treatment facilities for children in need of help after Court adjudication—as has been done by other states.

Occasionally, as a result of such a campaign as in the instance of narcotic users, a new facility for the treatment of young addicts is established. But, it is indeed a sad commentary that the State of New York is forced to provide such a facility only when the newspapers “discover” that young people are using drugs.

It is an even sadder commentary that because innocent babies present no immediate threat to the community, they can be left to deteriorate in hospital wards without causing sufficient concern to City or State authorities or indeed the press or citizens to demand that their futures should not be blighted at the very beginning of their lives. Only last week, when I requested foster home care through the Department of Welfare for children who had been waiting in a shelter for months, I was advised that there were already 85 such children on the waiting list, and that the Department would absorb them only at the rate of six a month. This means another fourteen month wait.

I cannot close without pointing out that the Children's Court through its approach to the problems of children in trouble, even with the limited facilities available to sustain, to treat and to rehabilitate children and families, has made a significant and perhaps unique contribution to the field of law and social welfare. The time has however come when we must close the gap between what we know needs to be done for children in trouble and what we are actually doing.

It is my hope that tonight's session, sponsored by The Association of the Bar, may mark the rekindling of the concern for children that characterized the pioneers of the Children's Court movement, and that this concern will inspire the Bench, the Bar, voluntary

agencies and public agencies to secure the personnel and the facilities needed to translate the high vision of its founders into reality.

RAYMOND M. HILLIARD

Executive Director, Welfare and Health Council

Institutions available to the Children's Court reflect, in part, the variety of function and services which are necessarily a part of a complex community like New York. I say, in part, because as I shall indicate later, we are constantly aware of the lack of variety of needed services which must be available if New York City is to do an adequate job in caring for children.

In 1951 there were a total of 1,606 boys and girls committed by the Children's Courts to agencies. 1,065 of this group came under the Court category of "delinquent," 417 others "neglected," and 124 others "mentally defective." The great majority of these boys and girls were placed in a wide variety of institutions.

The differences in function of these institutions are such that a manual has been produced by the Association of Children's Institutions of New York State. It lists some 100 institutions. In spite of this somewhat overwhelming number, it must be remembered that many of the services they render are inadequate in terms of the needs of the severely damaged child before the Court. In some instances, restrictive intake policies render the service unavailable to the Court. In still other instances services are duplicated. As a result there are wide gaps in services woefully needed by the Court.

A group of buildings do not constitute an institution. The Children's Court, by the very nature of its function, is concerned with providing help to children, with providing the essentials necessary for their healthy development. It must view each institution in terms of its ability to meet this responsibility to children.

I believe that there are certain characteristics of any good institution. A good institution has a well-defined purpose and is clear about what it is doing. This means that it states clearly what it can do and refuses to accept a child whose needs it cannot meet. I believe that a good institution has, through its board and staff, a good relation to the community. This kind of contact not only broadens the view of the institution, keeps it attuned to changing needs in the community, but also helps it secure the support and sanction of the total com-

munity. Equally important, a good institution has, in quantity and quality, those services needed to carry out its function and to provide real help to children it accepts for care. I refer not only to a good educational program, casework and psychiatric services, but also to a conviction about its responsibility to help the family of the child assume its rightful responsibility for the child. As institutions place more emphasis on providing service to children and then properly moving them back with their families, we will begin to break part of the jam that exists now in our entire foster care program.

There are two State institutions for delinquent children available to the Children's Courts in New York City—Warwick for boys and Hudson Training School for girls. However, the State of New York has never assumed its full obligation for children needing care. It has delegated to local municipalities the care and the cost of care for neglected children who need institutional service. Many of the serious limitations placed on the Court in providing institutional care for children who need it results from this abrogation of responsibility by the State. The State of New York should treat such indispensable welfare services as a legitimate item for reimbursement as do almost all other states. The State of New York should also wake up and use some of the Federal windfalls which come to it for welfare purposes but which are diverted to other purposes instead of meeting legitimate welfare needs.

Specifically, the State of New York should reimburse its public welfare districts for the cost of foster care of children. The State will reimburse 80 per cent of the cost of care of a child eligible for aid to dependent children who needs only a grant of money to enable him to live in his own home with his own mother. If, however, that child should lose his mother, if she dies, becomes ill for a long period, or worse, abandons him, that child not only suffers the terrific emotional shock of the loss of a home, the loss of a mother, the loss of his whole little world, but also he loses the State of New York. Now that he is desperately, acutely in need, the State disclaims him as a financial responsibility and leaves him to the local public welfare district—to be cared for as best it can within its strangulating resources.

In this City, institutions are available only through the three religious groups and a few non-sectarian private sources. We have preferred that children go to an institution of his or her own religious faith and this principle is supported by law. Institutional care has

been a private-public partnership where certain basic reimbursement has been made by the City for the wards of the City, but where great responsibility and many important costs are carried by the voluntary agencies. We have worked consistently at the Welfare and Health Council with the help of the federations and non-sectarian leaders to maintain adequate reimbursement for these costs of care, because sufficient financing is basic.

In looking at the overall picture, we must recognize that we still have an insufficient variety of institutions as well as insufficient services in many existing institutions. There is a complete absence of institutions for certain groups. A study of gaps in institutional services for juvenile delinquents made at the Welfare Council in 1949 showed that existing agencies cannot further revamp their programs to absorb these three groups of children:

Boys adjudged delinquent under the age of twelve;

Disturbed children who are ineligible for State hospital care;

The educationally retarded children, particularly those under the sixth grade level.

There is a lack of facilities for the seriously emotionally disturbed child—the child who is too sick to fit in existing facilities, and not really sick enough to go to a mental institution. Warwick, to a limited extent, cares for this group. The Jewish Board of Guardians and New York Catholic Charities offer some help. But there aren't sufficient institutional facilities for an emotionally disturbed child. There should also be an intermediate diagnostic institution for disturbed children who must be committed by the Court.

An obvious need is a type of residence for adolescent boys on probation who do not need the usual institution, but cannot, for various reasons, go back to their homes. Judges have spoken to the Council of the heartbreaking experience of having to send boys to institutions because there was no other place for them. Residences where boys can live and work or go to school have proved their value in being a sort of half-way house to independence. Plans have been worked out at the Council for this type of residence but lack of financial support has kept this type of service from becoming a reality.

The Commission on Foster Care, of which I have been a member, has recommended that there be a public institution in the City for dependent and neglected children.

In addition to filling the gaps of institutional services and provided

recommended new services, there is urgent need for a rearrangement of existing services in such a way as to make the best use of what we have. In many instances, this will mean that some institutions must give up functions no longer needed or functions that duplicate what is already being done. It also means that boards will need to be willing to see their services revamped according to a mutually agreed plan that takes into account the needs of children as seen by the Court, the Department of Welfare and the community at large.

Courts have to act swiftly in most cases in arranging care for children. In New York City, they are faced with the necessity of often having to make a number of time-consuming contacts with voluntary agencies serving the community. This necessarily slows down the speed with which a placement can be made. Institutions having more demands than they can meet have become more selective and the deliberate decision is more than the Court can wait for.

At the Welfare and Health Council, we have recommended a co-ordinated plan of intake for the courts and the Department of Welfare, all of which use the same voluntary agencies. A committee has been authorized by our Board (a recommendation of the Committee on Casework Services in Children's Institutions), and we look forward, as soon as staff service is available, to working out such a plan, which we believe would relieve some of the excessive shopping for "places in institutions" which inevitably goes on. We should not make our children wait. Their time is too important; they are growing up.

JOHN J. MURPHY

*Executive Director, Children's Center, New York City
Department of Welfare*

Although the Children's Court is responsible for adjudicating both delinquent and neglect petitions, I will only discuss that part of the court's responsibility that has to do with the placement of the neglected child. A neglected child is one who is usually involuntarily separated from parents or guardian for reasons of failure by the parent or guardian to provide proper care and guidance for whatever reason. A dependent child is a child whose parent or guardian voluntarily permits separation, usually for reasons of their inability to provide proper care for whatever reason. The neglected and dependent child is the same type of child except for the process involved

in arriving at the determination. In essence, the neglected child is so found after judicial process, and the dependent child is so found after social process.

Temporary Care is a period usually not to exceed three months during which time the referral agency undertakes a study which leads to a recommendation that (1) the child return to his own home where special service is made available both to the child and to the parent or guardian for purposes of rehabilitation or (2) placement in Foster Care. Foster Care is a generic term for either a Foster Home which is a family setting which, after careful screening, agrees to take one or more children into the familial unit, or, Group Living in an Institutional or Apartment setting which cares for large numbers of children.

Available to the Domestic Relations Court through the New York City Department of Welfare's Allocation Unit are a number of Temporary Care facilities. There are eleven temporary shelters of a congregate type with a total capacity for 806 children. There are four shelter boarding home agencies with a capacity for 243 children and one temporary boarding home agency with a capacity for 25. The total capacity for temporary shelters, shelter boarding homes and temporary boarding homes available to the Court and the Department of Welfare on any given day is 1,074 beds. This total figure excludes beds held for private admissions. As of April 1, 1952, 88 children, mostly infants, were sheltered in Pediatric wards of our City hospitals, and 92 children sheltered in other child caring agencies and settings for a total of 180 children being cared for in other than the agencies whose primary purpose and function is the temporary care of children.

On April 1, 1952, there were 1,273 children in temporary care, of which approximately 600 were children who were awaiting Foster Care for periods in excess of three months, some for as long as two or three years. The problem, then, is not a lack of temporary care facilities but rather the inability of the Foster Care agencies to absorb all of the children requiring Foster Care. As of January 1, 1952, there were approximately 15,000 of New York City's dependent and neglected children in Foster Care.

Dependent and neglected children are "troubled children." They have been exposed to the traumatic experiences of rejection, improper guardianship and abandonment. They are often frightened, anxious and deprived, not only of the physical requirements but,

more importantly, of the love, affection and understanding which is not only their right but most basic need during the formulative years.

The effect of social and spiritual deprivation is revealed in a recent study made at Children's Center which indicated that 64% of the 330 children in residence on that day had special problems: For example, behavior problems appeared 133 times; intellectual retardation (I.Q. 90) or extensive educational disabilities appeared 95 times; children who had been psychiatrically evaluated and recommended for psychotherapy appeared 90 times; and health problems, 32 times. Despite the fact that 90 children had been recommended for psychotherapy (after diagnosis by a psychiatrist), Children's Center can provide this type of treatment for only 27 children, leaving 63 children without this essential therapeutic support.

It seems to me that there are two large problems facing the New York City public and private agencies concerned with the foster care of children. The first problem has to do with the unavailability of sufficient Foster Care facilities. This problem has been fully explored and 15 specific recommendations have been made by the New York City Commission for the Foster Care of Children. These recommendations include two very important items: (1) Expansion of private and publicly operated Foster Care facilities and (2) establishment of Special Facilities for emotionally disturbed children for whom special care is necessary.

In connection with the need for additional Foster Care facilities, I am of the very definite opinion that some children in temporary shelter for as long as one, two or even three years react adversely for the reason that they are aware of "being different," from those children who return to their own home or who are placed in foster care.

The establishment of a Special Facility has to do with those children who fall in the "twilight" zone, namely, they are not sick enough for commitment to a mental hospital but are too sick for placement in Foster Care. Practically all of these children are emotionally ill prior to coming to the Center, many of them having been psychiatrically diagnosed before admission. Studies at Children's Center reveal that the number of disturbed children for whom psychiatric care has been recommended increased from 68 on May 9, 1951 to 80 on November 28, 1951 and 90 in March, 1952.

A number of the children so identified can be properly absorbed into the total child care program of Children's Center or any other

temporary shelter while awaiting Foster Care, providing that the Center and the other institutions have psychiatric, psychological and casework services in sufficient degree to meet the needs of the children so described. There are some of these seriously disturbed children, however, who despite the best efforts of the Center, are not amenable to care and treatment in a kind of setting which is permissive rather than restricted. This latter group are very sick and they have great difficulties, if not inability, in relating adequately to their counselors and peers.

They manifest behavior syndromes of destructiveness, profanity, running away, assaultiveness, truancy, and the problem of control and manageability in a permissive setting becomes exceedingly difficult. They have been diagnosed by a psychiatrist as having Primary Behavior Disorders, Schizophrenia (Incipient), Severe Anxiety States, Reactive Depression, Anxiety Neuroses, etc. These children are not psychotic but they do not properly belong in any temporary shelter, either with or without specialized service. They are prospective candidates for mental hospitals unless they are provided with the kind of therapeutic help that is available in a residential treatment home.

Children less seriously ill, and even some children with no emotional problem, become increasingly disturbed if they have to live closely together with emotionally ill children over an extended period of time. No healthy child can live comfortably and develop social behavior in an environment which is continuously upset by highly disturbed and often pre-psychotic dormitory peers.

Children's Center was established under the auspices of the Department of Welfare on October 1, 1947. It is responsible for the program for the children under care in respect to their health, welfare, recreation, education and spiritual guidance. At Children's Center there is a recognition of services to children as a specialized field requiring professionally trained personnel and, as such, the institution must be staffed with personnel equipped to meet the various day by day and treatment needs of its children. The Center was established as a shelter for dependent and neglected children requiring temporary care away from their own homes, but circumstances beyond control have resulted in a majority of children remaining over the temporary care period of three months.

In order to meet the needs of all children and particularly the more seriously disturbed, the Center has developed, in addition to home

life departments which, incidentally, is the heart of any group living experience, the following specialized services: The Psychiatrist, Psychologist and Caseworkers who, in addition to specific assignments, serve as consultants and advisers to the Counselors in understanding and dealing with problems of the children, individual as well as group. Diagnostic and consultant services are provided to a limited extent. Psychotherapy for a few seriously disturbed children is undertaken. The Center assists the referral agency in making permanent plans for the children under care by providing information relative to behavior, adjustment, physical condition, schooling, etc., together with recommendations for Foster Care.

The Board of Education of the City of New York operates a school on the premises. Close liaison is maintained between the Public School Teachers and Children's Center Counselor staff. There are special remedial programs conducted by teachers in all classes, and two opportunity classes—one for children of low mentality and one for foreign speaking children.

The general medical program, under a contractual agreement with New York Medical College-Flower and Fifth Avenue Hospitals, is unique in that the Center, Hospital and Medical College have a mutually beneficial relationship in regard to training graduate pediatricians, development of research projects, and, above all, medical service to children.

Our recreational program includes arts and crafts, music, dancing, dramatic, swimming and games. Provision is made for participation in community activities, attendance at circus and rodeo, major league baseball games, movies, sight seeing, picnics and trips to beaches. Several community groups participate in the joint use of Children's Center facilities with a view to integrating the children of the Center with the children of the community. Religious instruction is provided on a sectarian basis through Catholic Charities, Protestant Federation and Jewish Federation.

It is our dedicated purpose that the child at Children's Center is made to feel that after all the rejection, the failures, the troubles which he has encountered, he is finally entering a place that will not let him down. While he will not find a permanent home or parents, he will find the essential qualities that make for a home which are warmth, direction, consistency and security.

Financially Irresponsible Motorists

By ARTHUR A. BALLANTINE

I am one of those who took much satisfaction in the report of the Committee headed by James B. Donovan submitted at the December 9 meeting of the Association and the action then taken endorsing the recommendations of the Committee that the Association urge legislation (1) providing for the impounding of every automobile which is involved in an accident resulting in substantial bodily or property damage, if the owner does not possess standard limit liability insurance and (2) for the creation of a fund out of which would be paid up to standard limits of liability unsatisfied judgments attributable to automobile accidents, such fund to be supervised by the Superintendent of Insurance, and to be created by levies upon uninsured registrants of motor vehicles and all automobile insurance carriers in this state.

My personal interest in the subject of losses caused by traffic accidents arose from acting years ago in Boston as counsel for the defense in actions in which the local transit companies were concerned. From my experience I concluded that the common law system for dealing with losses arising from such accidents was open to various objections. In 1916 I began writing pieces advocating the working out of a new system on the analogy of the workmen's compensation acts then recently coming into effect. As losses due to automobile accidents became so important, after I came to New York I was active in setting up a study of the subject under the auspices of the Columbia Council for Research in the Social Sciences. The Committee for the study was financed

Editor's Note: Mr. Ballantine has long been interested in the problem of the financially irresponsible motorist, and directed one of the important pioneer studies in the field. His statement, approving the proposals of the Association's Committee on Insurance Law, furnishes important support to those proposals. The resolution to which Mr. Ballantine refers may be found on page 3 of this number of THE RECORD.

by the Rockefeller Foundation and its membership included the late Professor Joseph P. Chamberlain, William Draper Lewis, then Director of the American Law Institute, Judge Charles E. Clark, then Dean of the Yale Law School, and the late Judge Bernard L. Shientag, who had so much to do with the establishment of the workmen's compensation plan in this state. The report of the Committee, published in 1932, set forth that the common law system works badly in this field and that under it recovery depends almost entirely on what might be the accident of the defendant being insured. The Committee recommended the substitution of a compensation plan. As stated in the Donovan report this plan was rejected by the Association in 1938, and it was rejected by the Donovan Committee. The compensation plan has not been adopted in any jurisdiction except in Saskatchewan, but the Columbia Council report has been widely discussed and has been helpful in promoting the use of liability insurance.

I now have modified my views about a compensation plan. In 1929 New York adopted a financial responsibility law (Article 6-A of the Vehicle Traffic Laws). This law requires security and proof of financial responsibility by a motorist concerned in an accident creating damage exceeding \$50. The penalty for failure to furnish proof of such security means suspension of the license. This law, amended from time to time, has tended to improve the situation of those injured by motor vehicles and will be made more effective by the amendments proposed by the Donovan Committee which the Association is to advocate.

Review of Recent Decisions of the United States Supreme Court

JOSEPH BARBASH AND ROBERT B. VON MEHREN

JOHNSON V. NEW YORK, NEW HAVEN & HARTFORD R.R. CO.

(November 17, 1952)

A party who succeeds in upsetting a jury verdict in a Federal court is no longer limited to a new trial; he may in a proper case obtain judgment notwithstanding the verdict, either by decision of the trial judge or direction of an appellate court. This right is granted by Rule 50(b) of the Federal Rules of Civil Procedure, which reads in part:

"RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed."

The Rule requires, for constitutional reasons, that a party seeking to secure a judgment n.o.v., must move for a directed verdict before the case is submitted to the jury. The instant case holds that the Rule imposes another technical requirement, *i.e.* the party seeking a judgment n.o.v. must in explicit language request such a judgment within 10 days after the reception of the jury's verdict. Thus, although the respondent railroad had complied with the first of these technical requirements, the Court held that because it had failed to comply with the second, it could be granted no more than a new trial.

After all the evidence had been submitted in petitioner's Jones Act wrongful death action, the railroad moved for a directed verdict on the ground that the evidence would not support either a finding that it was negligent or

that it had caused the deceased's death. The trial judge reserved decision; the jury returned a verdict for the plaintiff. Within ten days the railroad moved "to set aside the verdict" on the ground that it was (1) contrary to the law; (2) contrary to the evidence; (3) contrary to the weight of the evidence; and (4) excessive. In support of its motion, the railroad filed a brief arguing, among other things, the issues of negligence and causation. However, it did not specifically ask for either a new trial or judgment notwithstanding the verdict. The trial judge denied the post-verdict motion and at the same time denied the railroad's pre-verdict motion for a directed verdict. On appeal the Court of Appeals for the Second Circuit held that a directed verdict should have been granted on the issue of causation and reversed the district court. 194 F. 2d 194 (1952). This reversal, the parties agreed, required the District Court to enter judgment for the railroad notwithstanding the verdict. The Supreme Court granted certiorari to consider the single question of whether this disposition of the case was within the power of the Court of Appeals.

The Supreme Court decided in an opinion by Mr. Justice Black, four justices dissenting, that Rule 50(b) precluded entry of a judgment n.o.v. for the railroad. It had already been decided in *Cone v. West Virginia Pulp & Paper Co.* 330 U.S. 212 (1947) and reaffirmed in two later cases, the Court said, that neither a trial judge nor an appellate court might enter judgment n.o.v. unless a motion for such a judgment was made in the trial court within ten days after the verdict. Thus, in the Court's view, the sole question here was whether the railroad had made such a motion. The Court concluded it had not.

It rejected the contention that the railroad had in effect asked for judgment n.o.v. when it supported its "motion to set aside" with grounds that would have supported a motion for judgment n.o.v. Although this might indicate that the railroad intended to ask for judgment n.o.v., its motion "cannot be measured by its unexpressed intentions or wants." If the rule were otherwise, the opposing party's "opportunity to remedy any shortcomings" in his case might be "jeopardized by a failure to fathom the unspoken hopes" of the moving party.

It did not matter, moreover, that the trial judge had expressly reserved decision on the motion for a directed verdict. Since Rule 50(b) makes reservation automatic, express reservation is superfluous and thus has no bearing on the necessity for a post-verdict motion.

In dissenting, Mr. Justice Frankfurter, joined by Justices Jackson, Burton and Minton, charged the majority with requiring the intonation of an "abracadabra." The only "relevant inquiry," Mr. Justice Frankfurter asserted, "is whether the fair meaning of the proceedings after a verdict was rendered in fact constituted a disposition of a motion to enter judgment n.o.v." In the instant case the railroad raised within ten days after verdict the very issues that would have been raised by a specific motion for judgment notwithstanding the verdict, and the trial court's disposition after verdict of

those issues was the same disposition it would have given a specific motion for judgment n.o.v., although it labelled its action a denial of the motion for a directed verdict. Since the trial judge here had reserved decision on the pre-verdict motion for a directed verdict, it would have been simply "redundant" to have spelled out a specific request for judgment notwithstanding the verdict.

This case, Justice Frankfurter argued, differed significantly from the three cases relied upon by the majority. In each the Court of Appeals had ordered judgment notwithstanding the verdict on a ground that had not been considered by the trial court. Consequently, the trial court "never had opportunity to exercise the discretion which would have been open to it had the grounds on which the litigation went off in the Court of Appeals been relied on before the District Court in an appropriate motion." Here, on the other hand, the Court of Appeals decided for the railroad on one of the grounds that it had pressed unsuccessfully to the trial court.

Mr. Justice Minton not only joined Mr. Justice Frankfurter, but also dissented separately on the ground that Section 2106 of the Judicial Code, passed in 1948, overruled the three cases relied upon by the majority.

The chief importance of this case is its warning to lawyers that the supposed flexibility of the Federal Rules cannot always be relied on; the forms must sometimes be meticulously followed. It can be expected that most lawyers will now automatically request judgment n.o.v. whenever they move to set aside a verdict. The addition of a few words will remove in law the "prejudice" which the majority found to exist in fact.

MONTGOMERY BUILDING & CONSTRUCTION TRADES COUNCIL
V. LEDBETTER ERECTION COMPANY, INC.

(December 8, 1952)

What looked like an important case on state-federal jurisdiction in labor disputes turned out to be just another indication that litigants seeking Supreme Court adjudications must take careful procedural steps if they are to avoid the fate of Sisyphus.

The respondent Ledbetter obtained from an Alabama state court, *ex parte*, a "Temporary Writ of Injunction" enjoining an alleged secondary boycott by the petitioner, Trades Council. Trades Council moved to dissolve the injunction on the ground that the matter was within the exclusive jurisdiction of the NLRB. This motion was denied, and the order was affirmed by the Supreme Court of Alabama. Certiorari was granted, apparently because of the importance of the question.

At the argument held November 13, 1952, the Court raised an issue not previously discussed by counsel: whether it had jurisdiction to consider the question. Answering its own question in an opinion by Mr. Justice Minton, the Court held, Justices Black and Douglas dissenting, that it lacked juris-

diction and dismissed the petition for certiorari as having been improvidently granted.

The Court's opinion was based on two propositions: (1) the Supreme Court's power to review state court decisions is restricted by Section 1257 of the Judicial Code to "final judgments and decrees"; and (2) it has been held since *Gibbons v. Ogden*, 6 Wheat. 448. (1821) that a refusal to dissolve a temporary injunction is not a final judgment or decree.

Because the Court cannot enlarge its own jurisdiction, it was irrelevant that further delay might render the case moot. The interlocutory decree, the Court suggested, "could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case."

For the dissenters Mr. Justice Douglas argued that the only question presented was the "power" of the state court to issue a temporary injunction and that the assertion of "power" should be considered as "final" because: (1) the issuance of a temporary injunction "irretrievably alters the status of the dispute or in fact settles it"; and (2) the question of "power" can be determined "without reference to other questions."

Charging that the Court was being "technical," rather than "practical," Justice Douglas also pointed out that the Supreme Court could review a refusal by a state's highest court to issue a mandamus or "another appropriate state writ" against the judge issuing the temporary injunction. He did not indicate, however, whether Alabama made extraordinary writs available where appeals lay. In the Federal courts it would seem that extraordinary writs are not available under such circumstances.

On the other hand, the majority's suggestion that the Union surrender its defense on the merits to test in the Supreme Court the state court's jurisdiction, puts the Union in an unpleasant dilemma, a dilemma perhaps made more poignant than usual by the fact that in most labor disputes time is of the essence.

KEDROFF AND FEDCHENKOFF

V.

ST. NICHOLAS CATHEDRAL OF THE RUSSIAN ORTHODOX CHURCH IN NORTH AMERICA

(November 24, 1952)

The deed possessed by the corporation holding title to St. Nicholas Cathedral recites that it is to be the central place of worship and the residence of the ruling archbishop for the Russian Orthodox Church in North America.

A dispute as to who is the ruling archbishop entitled to the use and occupancy of the Cathedral raised the important constitutional questions considered in the instant case.

In 1903 the Russian Orthodox Church in North America erected St. Nicholas Cathedral. As a result of the Bolshevik revolution, the American congregations in 1924 broke away from the Mother Church and organized the Russian Church in America. That schismatic body denied the authority of the Moscow Patriarch of the Russian Orthodox Church and governed itself in accordance with the statutes adopted at its own conventions. After its formation, this schismatic group took possession of the Cathedral. However, in 1925 one Kedrovsky appeared in New York and claimed to be the Archbishop duly appointed by the Patriarch to head the American diocese. In *Kedrovsky v. Rojdesvensky*, 214 App. Div. 483 (1925), affirmed 212 N. Y. 457 (1926), the courts of New York held that Kedrovsky as the appointee of the Patriarch was entitled to possession of the Cathedral and that the American schism had no property rights in it.

In 1945, the Cathedral was occupied by one Benjamin Fedchenkoff, who claimed to have been appointed Archbishop by the Supreme Church Authority of the Russian Orthodox Church, *i.e.*, the Patriarch of Moscow. The right of Archbishop Fedchenkoff to use and occupy the Cathedral was challenged by one Leonty, the schismatic Metropolitan of all America and Canada and the Archbishop of New York. Leonty, who had been elected to this office by a convention of the schismatic churches, sought to secure possession by having the Cathedral bring an action for ejectment against Fedchenkoff and one Kedroff.

Before this law suit was begun, the New York Legislature had passed Article 5-C of the New York Religious Corporations Law, but the bill was not signed by the Governor until one day after suit was commenced. Article 5-C purported to control the incorporation and administration of Russian Orthodox churches within New York. It provided, in part, that "Every Russian Orthodox church in this state . . . shall recognize and be and remain subject to the jurisdiction and authority of the . . . Russian Church in America. . . ."

Basing its conclusion on Article 5-C, the New York Court of Appeals held that Leonty was entitled to the use and occupancy of the Cathedral. 302 N.Y. 1 (1950). The case was appealed to the Supreme Court, which noted probable jurisdiction, and, with Mr. Justice Jackson dissenting, reversed and remanded "for such further action as it [the Court of Appeals] deems proper and not in contravention of this opinion."

The opinion of the Court was written by Mr. Justice Reed. The Court's precise holding is far from clear. However, a close reading indicates that the Court held (a) that Article 5-C is unconstitutional and (b) that settlement of the dispute concerning the right to use the Cathedral is strictly a matter of ecclesiastical government.

The majority opinion states the question before the Court in these terms:

"Determination of the right to use and occupy St. Nicholas depends upon whether the appointment of Benjamin by the Patriarch or the

election of the Archbishop for North America by the convention of the American churches validly selects the ruling hierarchy for the American churches."

The majority finds that Article 5-C is an "unconstitutional interference with the exercise of religion" because it:

"undertook by its terms to transfer the control of the New York churches of the Russian Orthodox religion from the central governing hierarchy of the Russian Orthodox Church, the Patriarch of Moscow . . . , to the governing authorities of the Russian Church in America. . . . Such a law violates the Fourteenth Amendment. . . . Should the state assert power to change the statute requiring conformity to ancient faith and doctrine to one establishing a different doctrine, the invalidity would be unmistakable."

Article 5-C cannot be justified as an attempt by the Legislature of New York to free "the American group from infiltration of . . . atheists or subversive influences." The Legislature has undoubted power to punish subversive acts, but here no such acts are charged. Furthermore, Article 5-C's "infringement upon traditional liberties," cannot be justified as a measure properly designed to cure some specific evil within the doctrine of *American Communication Assn. v. Douds*, 339 U.S. 382 (1950). In the *Douds* case the right restricted was the right of the Union to deal with the Government, a right not protected by the Constitution; here the right restricted was constitutionally protected.

Having concluded that Article 5-C is unconstitutional, the majority then holds that the question of who is entitled to occupy St. Nicholas is ecclesiastical and not judicial. This result is reached rather indirectly. Using *Watson v. Jones*, 13 Wall, 679 (1871), as a springboard, the majority finds that "Freedom to select the clergy, when no improper methods of choice are proven, . . . must now be said to have federal constitutional protection as a part of the free exercise of religion against state interference." Since the right to possession of the Cathedral turns on the question of who is the ruling Archbishop for the Russian Orthodox Church in North America, the courts of New York must abide by the decision of that Church.

The overall effect of the Supreme Court's decision would seem to be to require the New York courts to enter judgment for Fedchenkoff, unless it can be shown (a) that the Russian Orthodox Church has, as a matter of its canon law, relinquished the power to appoint the ruling Archbishop and vested that power in the American schism, or (b) that Leonty had been duly appointed ruling Archbishop by the Russian Orthodox Church. It seems very unlikely that the respondents will be able to establish either of these propositions. Moreover, even if New York should hold that neither Fedchenkoff nor Leonty were the duly appointed ruling Archbishop, judgment

would necessarily be for Fedchenkoff because Leonty would have no right upon which an action of ejectment could be premised.

A concurring opinion, joined in by Mr. Justice Black and Mr. Justice Douglas, who also joined the majority opinion, was filed by Mr. Justice Frankfurter. He states the problem before the court as a problem of "the power to exercise religious authority." He finds that by Article 5-C the New York Legislature had decreed "that one party to the dispute and not the other should control the common center of devotion. In doing so the legislature effectively authorized one party to give religious direction not only to its adherents, but also to its opponents." He concludes that, "when courts are called upon to adjudicate disputes which, though generated by conflicts of faith, may fairly be isolated as controversies over property and therefore within judicial competence, the authority of courts is in strict subordination to the ecclesiastical law of a particular church prior to a schism." It follows that the ecclesiastical law of the Russian Orthodox Church prior to the American schism, and not the law of New York, controls here.

Mr. Justice Jackson dissented in an opinion in which the conclusion is derived from the statement of the question presented. He defines the case before the court as "an ordinary ejectment action." He believes that if "the Fourteenth Amendment is to be interpreted to leave anything to the courts of a state to decide without our interference, I should suppose it would be claims to ownership or possession of real estate within its borders. . . ." He does "not see how one can spell out of the principles of separation of church and state a doctrine that a state submit property rights to settlement by canon law." He concludes that the appeal should have been dismissed.

There seems to be little doubt as to the correctness of the Court's decision. Both Justice Reed's majority opinion and Justice Frankfurter's concurring opinion recognize that something more than the mere right to possess real property is in issue. Both opinions recognize that the fundamental question is whether the Legislature of New York can regulate the internal government of a church and resolve controversies arising out of a schism in a church. It seems perfectly clear that to have permitted New York to do what it sought to do would have resulted in interference by that state in religious questions. Whatever the merits of such an interference here, it seems clear that to permit interference at all would be to uncork the age-old controversies which the Constitution was designed to eliminate.

It is interesting to note that the Court made the instant case turn on the religious issue rather than on the due process question raised. It is difficult to believe that the Legislature of New York acted consistently with due process when it passed a statute which purported to displace the judicial process and to decide a controversy by decreeing that one party and not the other party was entitled to possession of the property in dispute. Why the Court did not discuss the due process question is a matter for speculation. Its failure to do so can only serve to emphasize the point on which it chose to make the case turn.

WIEMAN ET AL. V. UPDEGRAFF

(December 15, 1952)

By statute Oklahoma requires that a loyalty oath be subscribed to by all state officers and employees. This oath contains the following clauses:

"... That I am not affiliated directly or indirectly ... with any foreign political agency, party, organization or Government, or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; ... that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of ... any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization ..."

Appellants, employed by Oklahoma as members of the faculty and staff of Oklahoma Agricultural and Mechanical College, failed to swear as required by statute. Appellee Updegraff thereupon brought the instant action seeking, as a citizen and taxpayer, to enjoin the appropriate state officials from paying further compensation to employees who had not subscribed to the oath. Appellants, who were permitted to intervene, attacked the statute as a violation of due process and on a variety of other constitutional grounds. They based their constitutional objections primarily upon the language of the statute above-quoted.

The courts of Oklahoma held the statute constitutional and enjoined the state officers from making further salary payments to appellants. The Supreme Court "noted probable jurisdiction because of the public importance of this type of legislation and the recurring serious constitutional questions which it presents." It held (8-0, Mr. Justice Jackson not participating) that the statute offended due process.

The Court's opinion was written by Mr. Justice Clark. Recognizing that the purpose of the statute "was to make loyalty a qualification to hold public office or be employed by the State" (305 Okla. 301, 305), the Court defined the problem before it as "the problem of balancing ... the interest in national security with the often conflicting constitutional rights of the individual." The Court considered this question in the context of three of its earlier cases: *Gerende v. Board of Supervisors*, 341 U.S. 56 (1951); *Garner v. Board of Public Works*, 341 U.S. 716 (1951); and *Adler v. Board of Education*, 342 U.S. 485 (1952). In all of these earlier cases the Court had found that due process was not offended because the statute in each case was effective only where the public servant had joined the "subversive organiza-

tion" with knowledge of its organizational purpose. Such knowledge was, however, "not a factor under the Oklahoma statute" and, consequently, the Court was "brought to the question touched on in *Garner*, *Adler*, and *Gerende*: whether the due process clause permits a state in attempting to bar disloyal individuals from its employ to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged."

Starting with the premise that "membership may be innocent," recognizing that exclusion from public employment on loyalty grounds is "a badge of infamy" and believing that the Oklahoma statute stifled "the flow of democratic expression and controversy at one of its chief sources," the Court held that "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process."

The *Adler* case and *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), are not, as appellee Updegraff insisted, *contra*. In *Adler* the Court had said that persons seeking employment in the New York public schools "may work for the school system upon the reasonable terms laid down by the proper authorities of New York." 242 U.S. 485, 492. To conclude from this that "there is no constitutionally protected right to public employment is to obscure the issue." In *Mitchell* the Court had emphasized that Congress could not exclude persons from federal employment solely because of their race, color or creed. 330 U.S. 75, 100. Thus, although the Court does not "consider whether an abstract right to public employment exists," it does assert "that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."

Both Mr. Justice Black and Mr. Justice Frankfurter joined the Court's opinion. Each of them also filed a separate concurring opinion. Mr. Justice Douglas joined both of those concurrences.

Justice Black forcefully repeated his "belief that the right to speak on matters of public concern must be wholly free or eventually be wholly lost." By this test the Oklahoma oath statute, which "is but one manifestation of a national network of laws aimed at coercing and controlling the minds of men," is "fatally offensive to the due process guaranties of the United States Constitution." Although one may sympathize with Justice Black's desire to increase the allowable scope of freedom of expression, his basic premise seems to be too extreme. It cannot be supposed that freedom of speech, or indeed any other freedom, is an absolute. It is this relative quality of all freedoms and the necessity of balancing the demands of competing interests that makes democratic government so difficult to achieve and to operate.

Justice Frankfurter found that Oklahoma's statute: "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." As such, it strikes "at the base of all our civil and political institutions" by inhibiting our teachers in fostering "those

habits of open-mindedness and critical inquiry which alone make for responsible citizens." No state has the power to curtail the underlying principles of liberty upon which our system of government is based.

The real importance of the instant decision is not so much the Court's holding as the fact that the oath was condemned. The fears of some that the Court would permit loyalty oaths to burgeon without any judicial pruning have been proved false. Moreover, the mere fact of judicial intervention may now cause legislatures at least to pause before enacting extreme "loyalty" legislation.

Committee Report

COMMITTEE ON REAL PROPERTY LAW

RIGHTS OF MORTGAGEES TO RETAIN FIRE INSURANCE PROCEEDS

Canards to the contrary, men trained in the mysteries of legalistic thinking still retain moral sensibilities. And every once in a while there is handed down an authoritative court decision which shocks the lawyers' sense of justice between man and man. Such a decision was that in *Savarese v. Ohio Farmers Insurance Co.* (1932) 260 N. Y. 45, which held that fire insurance payable under a policy taken out by a property owner to protect himself and his mortgagee could be collected and retained by the mortgagee notwithstanding that the owner had repaired the fire damage and so had restored the mortgagee's security. One who pays for insurance naturally expects to be indemnified if a loss occurs, and the ability of many an owner to finance repair of the damage, particularly where it is extensive, may depend on the availability of insurance moneys for that purpose. Leading institutional lenders profess to make it a practice, in all but very exceptional cases, to consent that insurance moneys be applied to restoration of the mortgaged premises to their condition before the damage occurred. But there are certainly lenders who are not thus cooperative, and in any event the idemnification of the owner who buys the insurance and repairs the damage should not be a matter of grace on the part of the holder of the mortgage, who, as the law now stands, may if he chooses not only apply the insurance moneys in reduction of that mortgage, but also insist that the owner live up to the terms of the mortgage until it matures in accordance with those terms. For, following the rationale of the *Savarese* case, it has been held that the owner who has on his neck such an uncooperative mortgage holder, may not

Editor's Note: This report will be presented to the Stated Meeting of the Association on January 20, 1953.

obtain new mortgage money with which to prepay the existing mortgage and restore the damaged property; the holder of the existing mortgage may refuse the prepayment. *The Terraqua Corp. v. Emigrant Industrial Savings Bank*, N.Y.L.J. Aug. 22, 1947, p. 305.

The reason why the doctrine of the Savarese case shocks the lay conscience is that it departs from the fundamental principle of insurance law that insurance shall provide indemnity only, and shall not profit or otherwise advantage the party insured. If the owner repairs the damage or is willing to repair it, from his point of view it is only just that he should be indemnified from the insurance moneys.

Of course, it is also necessary to consider the matter from the standpoint of the mortgagee. He, too, is interested in a fair disposition of the insurance proceeds. Since his position is different from that of the owner of the property, what is fair to the one may be unfair to the other. But this much is clear: the most that the mortgagee should have the right to insist upon is that his security has not been impaired in consequence of the fire. While it is true that when a fire loss occurs, protection of the mortgagee's investment should have priority over protection of the owner whose property has been damaged; nevertheless the holder of the mortgage should not be heard to say that this protection has not been accorded to him if his security is restored to what it was before the fire took place. The insurance moneys should constitute indemnity for the fire loss and nothing else.

Accordingly, if the owner will repair, the mortgagee should not be able to hold on to those moneys because, for example, the neighborhood has so changed for the worse that the property if restored may not be adequate security, or because restoration to its former state would not make nearly so good use of the land as would its improvement in some other way, or because a marked drop in real estate values has made doubtful the ultimate collectibility of the mortgage in full. Such reasons, while sound enough from a business or financial standpoint, are departures

from the basic insurance principle of indemnity for the loss, and involve an attempt by the mortgagee to gain an advantage he would not have had if the fire had not occurred. They are not reasons why such owner should not be entitled to reimbursement to the extent of the insurance moneys.

The departure in the *Savarese* case from this principle of indemnity has promoted repeated attempts to correct by statute the manifest injustice resulting from that decision. Bills have been drafted and some have been introduced in our legislature. Thus far none has been passed. For the most part they were proposed as amendments of Section 254 of the Real Property Law, which purports to construe the usual covenant by a mortgagor to provide fire insurance protection for the mortgage, and which in so doing gives the mortgagee the right to elect whether the insurance moneys shall be applied to reduce the mortgage or to restore the damaged property. It is more consonant with justice if this right of election is given not to the mortgagee, but to the owner of the mortgaged property, provided that the mortgagee can be assured of having that property restored to the condition in which it was immediately before the fire, and provided further that the mortgage is not in default, and that any payment of insurance moneys to the owner is limited to the lessers of (a) the reasonable value of the repairs or (b) the actual cost of the repairs and the reasonable value of so much, if any, of those repairs as are made by such owner himself or by others for his benefit.

To provide a fundamental remedy for the *Savarese* doctrine it is necessary to make the insurance proceeds available to indemnify the owner who repairs the property, without at the same time doing violence to the conflicting right of the holder of the mortgage to have his security restored. This area of conflict arises when the insurance moneys are not, or may not be, sufficient for full restoration of the property to its prior undamaged state. In such case the insurance moneys should not be paid to the holder of the mortgage unless the mortgage holder can be assured of the availability of sufficient other funds to enable the owner to com-

plete the restoration of the mortgage property to its former condition. This presents an issue of fact on which the property owner and the mortgage holder may disagree. However, that issue will not exist if the owner is given the right to have the insurance moneys paid to him on proof that the repairs have already been fully accomplished.

It is not so clear that the owner should be entitled to the insurance moneys before the fire damage has been made good. Until completion of the repairs the holder of the mortgage needs protection. His security could be impaired if the insurance moneys were paid over and then the owner failed to repair the damage properly and completely. The principle that insurance is indemnity must apply to both the owner and the mortgagee, for both of them are protected by the insurance policy. Unless the damage to the security has been fully made good, the holder of the mortgage should have first claim on the indemnity afforded by the insurance proceeds, and he should not be called on to surrender that safeguard against the impairment of his security so long as there is any reasonable doubt that the damaged property will be restored to its condition before the fire occurred. To entitle the owner to receive the insurance moneys before making the repairs, he should first prove, to the satisfaction of either the mortgage holder or arbitrators or a judicial tribunal, that the repairs requisite for restoration can and will be accomplished from available funds, not necessarily limited to the insurance moneys. It would seem, too, that the owner should be required to go further and similarly prove that if the matter has to go to arbitration or litigation, these available funds are also sufficient to cover the arbitration or litigation costs otherwise payable by the mortgagee. A mortgage investment is normally made in the expectation that it will not subject the holder to expense beyond that involved in the ordinary servicing of the mortgage.

Proof of that sort can involve serious controversy. Issues such as the cost of a proposed restoration of the building to its former condition, or the existence and sufficiency of available funds to

cover the excess of such cost over the amount of the insurance moneys, may have to be resolved by litigation or arbitration in order to settle the conflicting interests of the property owner and the mortgage holder.

However, your Committee believes that this area of controversy is not apt to be serious where the owner of the premises claims reimbursement from the insurance moneys after the repairs to the fire-damaged building have been fully completed. The holder of the mortgage is not then likely to object to reimbursement for the cost or reasonable value; and if he does, proof by the owner of the adequacy of the repairs and of the reasonableness of the amount for which reimbursement is sought should be relatively simple. In such cases, the mortgage holder to whom such proof is submitted is unlikely to compel the property owner to resort to litigation or arbitration.

Accordingly, your Committee recommends that Section 254 of the Real Property Law be amended in the following form:

AN ACT

To amend the real property law, in relation to the distribution of the proceeds of fire insurance policies and the rights of the mortgagor and mortgagee with reference to the repair or replacement of fire damaged premises

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Subdivision four of section two hundred fifty-four of the real property law, as last amended by chapter eight hundred eighty-six of the laws of nineteen hundred forty-five, is hereby amended to read as follows:

4. Mortgagor to keep buildings insured. A covenant "that the mortgagor will keep the buildings on the premises insured against loss by fire for the benefit of the mortgagee; that he will assign and deliver the policies to the mortgagee; and that he will reimburse the mortgagee for any premiums paid for insurance made by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering the policies," [must] *shall* be construed as meaning **** and that should the [holder of the mortgage] mortgagee be reason of such insurance against loss by fire receive any sum or sums of money for damage by fire, [such amount may be retained and applied by the holder of the mortgage toward] *and should the mortgagee re-*

tain such insurance money instead of paying it over to the mortgagor, the mortgagee's right to retain the same and his duty to apply it in payment of or on account of the sum secured by the mortgage and in satisfaction or reduction of the lien thereof [or the same may be paid over either wholly or in part to the mortgagor or to the heirs (or successors) or assigns of the mortgagor for the repair of said buildings or for the erection of new buildings in their place, or for any other purpose or object satisfactory to the holder of the mortgage, and if the mortgagee receive and retain insurance money for damage by fire to said premises, the lien of the mortgage shall be affected only by a reduction of the amount of said lien by the amount of such insurance money received and retained by said mortgagee] shall be limited and qualified as hereafter in this subdivision provided. Said insurance money so received by the mortgagee shall be held by him as trust funds until paid over or applied as hereinafter provided. If the mortgagor shall notify the mortgagee in writing within thirty days after the fire that the mortgaged premises have been damaged thereby, and shall thereafter make good the damage by means of such repairs, restoration or rebuilding as may be necessary to restore the buildings to their condition prior to the damage, then upon presentation to the mortgagee within three years after the fire of proof that the damage has been fully made good (and if he so demands in writing within thirty days after such presentation of proof, then upon presentation to the mortgagee within thirty days after such demand of proof also of the actual cost of such repairs, restoration and rebuilding and of the reasonable value of any part of the work so performed by the mortgagor) the mortgagee, unless he rejects the proof submitted to him as insufficient, shall pay over to the mortgagor so much of said insurance money theretofore received by the mortgagee as does not exceed the lesser of (a) the reasonable cost of such repairs, restoration and rebuilding or (b) the total amount actually paid therefor by the mortgagor, together with the reasonable value of any part of the work done by him. Such proof shall be deemed sufficient unless, within sixty days after presentation of all such proof to the mortgagee as aforesaid, he shall notify the mortgagor in writing that the proof is rejected. Any excess of said insurance money over the amount so payable to the mortgagor shall be applied in reduction of the principal of the mortgage. Provided, however, that if and so long as there exists any default by the mortgagor in the performance of any of the terms of provisions of the mortgage on his part to be performed the mortgagee shall not be obligated to pay over any of said insurance money received by him. If the mortgagor shall fail to comply with any of the foregoing provisions within the time or times hereinabove limited, or shall fail within sixty days after rejection of the proof so submitted to commence an action against the mortgagee to recover so much of said insurance money as is payable to the mortgagor as hereinabove provided, or if the entire principal of the mortgage shall have become payable by reason of default or maturity, the mortgagee shall apply said insurance money in satisfaction or reduction of the principal of the mortgage;

and any excess of said insurance money over the amount required to satisfy the mortgage shall be paid to the mortgagor. Unless the court, in any such action, shall determine that the mortgagee's rejection of the proof submitted by the mortgagor prior to the commencement of the action was unreasonable, the mortgagee may offset the reasonable amount, as determined by the court, of his expense incident to the litigation, and may reimburse himself out of the insurance money for the amount so determined. The term "mortgage," as hereinabove used, shall be deemed to include agreements extending or otherwise in any way modifying the terms or provisions of an existing mortgage. The term "mortgagor," as hereinabove used, shall mean the owner for the time being of the mortgaged fee or the junior mortgagee actually in possession of the mortgaged property, or the tenant for the time being in possession of the property under a lease which has been mortgaged. The term "mortgagee," as hereinabove used, shall be deemed to include the successors in interest of the mortgagee.***

Section 2. The limitations and qualifications hereinabove imposed on the mortgagee's right to retain proceeds of a fire insurance policy shall apply only to mortgages or extensions or other modifications thereof made after the effective date of this act.

Section 3. This act shall take effect immediately.

Explanation: Italic matter is new. Bracketed matter [] is old law to be omitted.

The Committee recommends the adoption of the following resolutions:

RESOLVED that The Association of the Bar of the City of New York approves the report of the Committee on Real Property Law recommending legislation to change the rule established by the case of *Savarese v. Ohio Farmers Insurance Co.* (1932) 260 N. Y. 45; and it is further

RESOLVED that the Association approves an amendment to Sec. 254 of the Real Property Law providing that the standard covenant by a mortgagor to keep the mortgage building insured for the benefit of the mortgagee be interpreted to require that after the owner has repaired the damage caused by a fire, the mortgagee be required to turn over to the owner that portion of the proceeds of the fire insurance equal to (a) the reasonable value or (b) the actual cost of the repairs, whichever is the lesser, and it is further

RESOLVED that the Association approves and recommends the

adoption of the amendment to Sec. 254 of the Real Property Law prepared by the Committee on Real Property Law.

Respectfully submitted,

COMMITTEE ON REAL PROPERTY LAW

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MAXWELL H. TRETTER

November 17, 1952

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SIDNEY B. HILL, *Librarian*

LEGAL ASPECTS OF THE USE OF ATOMIC ENERGY BY PRIVATE INDUSTRY

*"Good and evil we know in the field of this world
grow up together almost inseparably."*

MILTON "AEROPAGITICA"

Significant contributions are being made by unofficial groups to organize sound expression and opinion on questions pertaining to the physical and social sciences. Independent scientific groups and bar associations have proven particularly effective in presenting thoughtful research by means of committee reports on the problems arising from the fields of experimental nuclear physics. The *Committee on Atomic Energy* of this Association is studying the legal aspects of the use of atomic energy for private industry and this checklist has been compiled as a bibliographical tool for their use.

It is hoped that the fruits of these studies will move forward the Atomic Energy Program to accommodate it to both national defense and peacetime use.

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